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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 1069

FRED OLSEN LINE, a corporation, A/S GANGER ROLF, A/S BORGA and A/S BONHEUR,
Petitioners,
vs.
MADELINE CURRY, Administratrix of the Estate of Jack Curry, Deceased,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

STATEMENT OF THE CASE

Certain errors appear in petitioner's statement of the case. These may or may not be of concern to this court in passing upon Certiorari but we feel it desirable to point them out.

First it should be noted that the jury did not return "a general verdict for petitioners and a special verdict that the death of Curry was caused by his own negligence". What the jury did return was a general verdict and an answer to an interrogatory. The general verdict was in favor of petitioners. The interrogatory read:

> "Was Jack Curry contributorily negligent in any respect which aided in proximately causing the accident which resulted in his death?"

This interrogatory was answered in the affirmative.

The statement that respondent urged "that the California limits upon the grounds of recovery should not be adopted by the Maritime Law" is not an accurate statement of respondent's position. Respondent's position (as disclosed by the opinion below [Appendix vii]*) was,

> ". . . that it is likely that the Supreme Court will adopt the views expressed by Mr. Justice Brennan, dissenting in *The Tungus, supra* that once the state affords a remedy in a general way for wrongful death then the right is governed by the general maritime law rather than state law. . . ."

The statement "The Court of Appeals acknowledged that, under California Law, contributory negligence of the decedent would be a bar to the action, so far as it was grounded upon negligence . . ." is not an accurate statement. What the court did say is:

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*References are to Appendix to Petition for a Writ of Certiorari.

> "The *general rule* is that contributory negligence is a defense only to actions grounded on negligence and the California courts have applied this principle . . ." (Appendix xvii, emphasis added.)

Treated in context this sentence has a meaning totally different from that ascribed to it by petitioner, as we shall more fully discuss under the next heading.

REASONS FOR DENYING THE WRIT

Petitioner admits that the decision below is not in conflict with the decision of any other Court of Appeals. Petitioner, however, feels that in some manner the decision below has shattered uniformity or admiralty law as respects death cases. We submit that this is not so.

"Uniformity" in Death Cases

This court has long recognized that the rule of uniformity in maritime matters is not inviolate and that in certain fields the maritime law is affected by state legislation. Indeed we find the following language in what is generally regarded as the leading "uniformity" case (*Southern Pacific Company v. Jensen*, 244 U.S. 205, 216):

> "In view of these constitutional provisions and the Federal Act, it would be difficult if not impossible to find with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien

> upon a vessel for repairs in her own port may be given by state statute . . . and the right given to recovery for death cases (*The Hamilton* [*Old Dominion SS Co. v. Gilmore*] 207 U.S. 398) . . ."

Following the decision in *Jensen* this court reaffirms the applicability of state wrongful death statutes to maritime death cases in *The Tungus,* 358 U.S. 588, *Hess v. United States,* 361 U.S. 314 and *Goett v. Union Carbide Corp.,* 361 U.S. 340. The decision of the court below is in accordance with the teachings of these cases.

Decisions in Cases Involving Applicability of State Death Statutes to Seaman's Cases Are Inapposite

Lindgren v. United States, 281 U.S. 38 and *Gillespie v. United States Steel Corp.,* 379 U.S. 148, both reached the conclusion that states wrongful death statutes are inapplicable to seaman's cases. It is respectfully submitted that these two cases have no bearing upon the present problem. Both *Lindgren* and *Gillespie* turn upon this court's interpretation of the Jones Act as the exclusive remedy for death of seamen killed in the territorial waters of the state, superseding all state death statutes in an action against the shipowner. No similar statute exists with respect to longshoremen. Thus since the field has not been occupied by Federal legislation the state laws are to be given effect. (*The Harrisburg,* 119 U.S. 199.)

Contributory Negligence

Petitioner states (p. 9):

> ". . . Perhaps the ultimate confusion is presented by the present case, where California law is interpreted by the Court of Appeals (in accordance with State rulings) to recognize contributory negligence as a bar to the negligence count, while (without any State guidance) the comparative negligence rule is held to apply to the unseaworthiness count (R. 43045; Appendix xvii-xx). . . ."

The language used in the opinion must be read in the frame of reference to which the court limited it. The court said (Appendix vii):

> "It is not here urged that the California statute does not give a cause of action for wrongful death resulting from a maritime but local tort occurring within California waters. Our question is narrower: does that statute give such a cause of action where the sole basis asserted for liability is unseaworthiness not caused by negligence?"

The court then says:

1. "Appellees assert that, assuming the California statute provides a cause of action for unseaworthiness, contributory negligence of the decedent is a defense . . ."

2. Certain of the language of the opinion in *Buckley v. Chadwick*, 45 Cal. 2d 183 can be taken as indicating that contributory negligence is a defense to any action under the California wrongful death statute "We do not think the California Courts would so hold." (Appendix xvii.)

3. The court below then lists various types of actions in which contributory negligence has been held by California courts not to be a defense. (Appendix xvii-xviii.)

4. The Federal rule in unseaworthiness cases is the contributory negligence serves to mitigate damages. (Appendix xviii.)

5. ". . . That is the extent to which it is appropriate to the liability here asserted. We think that the California courts would so hold. *We are strengthened in that belief by the California courts' wholehearted acceptance of the federal rules of law as the measure of their duties when that law controls their decisions. . . .*" (Appendix xviii, emphasis added.)

Cited for authority for the last proposition is *Intagliata v. Ship Owners and Merchants Tow Boat Co.*, 26 Cal. 2d 365, 159 P. 2d 1. In *Intagliata* the Supreme Court of California specifically held that the doctrine of contributory negligence is not a defense to a maritime personal injury action based upon negligence.

The Statute of Limitations

Petitioner seems concerned with the decision in *Allen v. United States,* 338 F. 2d 116 (9th Cir. 1964) holding that the California Wrongful Death Act limitation of one year was applicable in an action involving the death of a longshoreman brought pursuant to the Suits and Admiralty Act. The statute of limitations is not involved in the case at bench. But the decision in *Allen* has been the law for some eighty

years. We refer to the dictum in *The Harrisburg,* 119 U.S. 199, 214 where the question of the applicability of the Massachusetts and Pennsylvania Wrongful Death Acts was discussed. There the court said:

> ". . . About this we expressed no opinion, as we are entirely satisfied that this suit was begun too late. The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within 12 months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all."

CONCLUSION

Some eighty years ago in *The Harrisburg (supra)* this court announced that there was no common law maritime cause of action for wrongful death; that any such cause of action must be created by statute. From the time of *The Harrisburg* to date the courts have looked for and, if found, applied the applicable statute. In *Southern Pacific v. Jensen* (*supra*) this court recognized that state statutes would be applicable to a wrongful death action, absent federal legislation, even though this might result in a lack of uniformity. It is apparently petitioner's position that to achieve uniformity the state wrongful death statutes should be disregarded. This would result (because there is no federal statute applicable) in depriving the heirs of a harbor worker of any action against a shipowner for death caused by a maritime

tort. We respectfully urge that Certiorari should not be granted to achieve such a result.

The argument concerning contributory negligence is, as we have pointed out, illusory. The court below decided only that contributory negligence was not a bar to a death action based on unseaworthiness. Certiorari is not required with respect to the statute of limitations—it is not an issue in the instant case.

Dated, San Francisco, California,
February 28, 1967.

Respectfully submitted,
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